IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GLEN A. KEEHN, Plaintiff, vs. LARRY G. MASSANARI, Acting Commissioner of Social Security, Defendant.	No. C 00-3064-MWB **MEMORANDUM OPINION AND ORDER REGARDING REPORT AND RECOMMENDATION**

TABLE OF CONTENTS

Credibility is the key to disposition of this action for judicial review of administrative denial of Social Security disability insurance benefits. Yet, as is often the case in such actions, credibility is the key without the slightest hint of prevarication or intentional exaggeration. Moreover, this court does not directly assess the credibility of the disputed evidence, only whether there is "substantial evidence" to support the ALJ's credibility determination. In this case, the credibility question is whether the administrative law judge properly discredited the testimony of the claimant and his wife, concerning the claimant's subjective pain complaints, and the opinions of his treating physician. Those credibility determinations had a further impact upon the way the claimant's impairments were described in a hypothetical question posed to a vocational expert who opined on the claimant's ability to perform jobs available in the national economy.

I. INTRODUCTION

This is an action for judicial review of the denial by the Social Security Administration of plaintiff Glen A. Keehn's application for disability insurance benefits. Keehn contends that he suffers from a disability, within the meaning of the Social Security Act, owing to a history of left arm and hip pain, low back problems, chronic pain syndrome, and depression, with an onset date of September 1, 1996. However, an administrative law judge (ALJ) for the Social Security Administration reached a contrary conclusion and denied Keehn's application for benefits. The ALJ's decision was affirmed through the

administrative appeals process, prompting Keehn to file the present action for judicial review on August 16, 2000.

This matter is now before the court pursuant to the March 23, 2001, Report and Recommendation by Magistrate Judge Paul A. Zoss concerning disposition of this matter and Keehn's April 4, 2001, objections to that Report and Recommendation. In his Report and Recommendation, Judge Zoss concluded that, although he might have weighed the evidence differently, substantial evidence existed on the record as a whole to support the Commissioner's decision to deny Keehn's application for benefits. Judge Zoss therefore recommended that judgment enter in favor of the Commissioner and against Keehn. Keehn asserts three objections to the Report and Recommendation. He contends, first, that the Report and Recommendation incorrectly assesses his testimony and that of his wife. Next, he contends that the Report and Recommendation incorrectly concludes that one physician, Dr. Richards, is not a "treating physician," and thus does not give proper weight and consideration to that physician's opinions concerning his disability. Finally, he asserts that the Report and Recommendation incorrectly determines that a hypothetical question relied on by the ALJ at step five of the disability determination process correctly states his residual functional capacity. Keehn contends that, if either of his first two objections is sustained, then the vocational expert's answers to hypothetical questions require a finding of disability. Contrary to Judge Zoss's recommendation, Keehn requests that this court find that he is eligible for disability benefits or, in the alternative, that the court remand this matter to the administrative process for further development of the "*Polaski* factors" used to analyze subjective pain complaints.

II. LEGAL ANALYSIS

A. Standards of Review

The standard of review to be applied by the district court to a report and

recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g.*, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review "of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court has done so by reviewing the record before Judge Zoss in light of Keehn's objections to Judge Zoss's Report and Recommendation.

Because *de novo* review is required of some portions of the record, the court turns next to the standard of review courts must apply to administrative decisions in Social Security disability cases. This court summarized those standards in *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056 (N.D. Iowa 2000), as follows:

> The role of the courts in such a review "is to determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole." *Singh v. Apfel*, 222 F.3d 448, 451 (8th Cir. 2000); *accord Wheeler v. Apfel*, 224 F.3d 891, 893-94 (8th Cir. 2000); *Burnside v. Apfel*, 223 F.3d 840, 843-44 (8th Cir. 2000); *Cunningham v. Apfel*, 222 F.3d 496, 500 (8th Cir. 2000). As the Eighth Circuit Court of Appeals recently explained,
>
> > Substantial evidence is less than a preponderance, but is

> enough so that a reasonable mind would find it adequate to support the ALJ's conclusion. *See Cox v. Apfel*, 160 F.3d 1203, 1206-07 (8th Cir. 1998). In determining whether existing evidence is substantial, we consider "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Warburton v. Apfel*, 188 F.3d 1047, 1050 (8th Cir. 1999).
>
> *Singh*, 222 F.3d at 451; *Wheeler*, 224 F.3d at 893-94; *Burnside*, 223 F.3d at 843-44; *Cunningham*, 222 F.3d at 500. Thus, under this standard of review, the court "may not reverse the Commissioner's decision merely because substantial evidence exists in the record that would have supported a contrary outcome," *Wheeler*, 224 F.3d at 894, "or because [the court] would have decided the case differently." *Burnside*, 223 F.3d at 843. Rather, "[t]he court is required to review the administrative record as a whole, considering evidence which detracts from the Commissioner's decision, as well as that which supports it." *Wheeler*, 224 F.3d at 894; *Burnside*, 223 F.3d at 843.

Wiekamp, 116 F. Supp. 2d at 1060-61. Subsequent decisions of the Eighth Circuit Court of Appeals apply identical standards. *See Lauer v. Apfel*, ___ F.3d ___, ___, 2001 WL 322161, *1 (8th Cir. April 4, 2001); *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001); *Dunahoo v. Apfel*, 241 F.3d 1033, 1037 (8th Cir. 2001); *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). Therefore, this court will apply these standards in its *de novo* review of the issues identified in Keehn's objections, taking each of those objections in turn.

B. Keehn's Objections

1. Assessment of testimony

Keehn first contends that the Report and Recommendation incorrectly assesses his testimony and that of his wife concerning the disabling nature of his pain. "[T]he credibility of the claimant is important in evaluating the subjective complaints of impediments."

Johnson, 240 F.3d at 1148. However, the Eighth Circuit Court of Appeals has cautioned that "[t]he ALJ is in the best position to determine the credibility of the testimony and is granted deference in that regard." *Johnson*, 240 F.3d at 1147 (citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984)). Therefore, courts "'will not disturb the decision of an [ALJ] who seriously considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain.'" *Id.* at 1148 (quoting *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996), in turn quoting *Browning v. Sullivan*, 958 F.2d 817, 821 (8th Cir. 1992)).

As the Eighth Circuit Court of Appeals recently explained,

> In analyzing a claimant's subjective complaints, such as pain, an ALJ must consider: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the condition; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions. *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (factors from *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). "Other relevant factors include the claimant's relevant work history and the absence of objective medical evidence to support the complaints." *Id.* As we have often stated, "there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is." *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993) (quoting *Thomas v. Sullivan*, 928 F.2d 255, 259 (8th Cir. 1991)). We will not disturb the decision of an ALJ who considers, but for good cause expressly discredits, a claimant's complaints of disabling pain, even in cases involving somatoform disorder. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993); *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995).

Gowell, 242 F.3d at 796; *see also Dunahoo*, 241 F.3d at 1038 (also identifying the "*Polaski* factors" for analyzing subjective pain complaints); *Hogan v. Apfel*, 239 F.3d 958, 961-62 (8th Cir. 2001) (also identifying the "*Polaski* factors").

More specifically, in *Gowell*, the court also noted that conservative treatment, the lack of organic disorders and "unremarkable" test results, inconsistent statements about pain or activities by the plaintiff, and failure to follow physician's recommendations all

discredit subjective pain complaints, although a battery of tests is an indication of severe pain, and abuse of prescription pain medications may in fact support complaints of pain. *Id*; *see also Dunahoo*, 241 F.3d at 1038-39 (examining all of the claimant's activities and considering the extent to which they were inconsistent with complaints of pain); *Johnson*, 240 F.3d at 1148 ("Acts which are inconsistent with a claimants assertion of disability reflect negatively upon that claimant's credibility," including "[t]he fact that [the claimant] was able to carry on with normal life"). Similarly, in *Hogan*, the court found that the record established sufficiently "good reason" to defer to the ALJ's credibility assessment, which resulted in the ALJ discounting the claimant's subjective pain complaints, "because her treatment was not consistent with the amount of pain she described at the hearing, because the level of pain she described varied among her medical records with different physicians, because the time between her doctor's visits did not indicate that she was suffering from severe pain, because she was apparently engaging in hobbies and household activities inconsistent with her alleged pain, and because of the closeness in time of her reprimand for diverting medication to her ceasing to work cast doubt on her assertion that she quit her job because of pain and side effects from her pain medication." *Hogan*, 239 F.3d at 962.

The ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149; *see also Dunahoo*, 241 F.3d at 1338 ("The ALJ may discount complaints of pain if they are inconsistent with the evidence as a whole."); *Hogan*, 239 F.3d at 962 (same). Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment *even if every [Polaski] factor is not discussed in depth.*" *Dunahoo*, 241 F.3d at 1338 (emphasis added) (finding further that the ALJ's decision was adequate where "[t]he ALJ recited the five *Polaski* factors and detailed the relevant evidence"); *Hogan*, 239 F.3d at 962. "Any arguable deficiency . . . in the ALJ's

opinion-writing technique does not require the Court to set aside a finding that is supported by substantial evidence." *Johnson*, 240 F.3d at 1149.

Keehn's objections notwithstanding, the court concludes that the ALJ's grounds for discrediting Keehn's and his wife's testimony about subjective pain are supported by substantial evidence. Although the ALJ may not have discussed each of the *Polaski* factors in detail, he did list those factors and considered the record, as a whole, in relation to those factors. *See* Transcript at 19-21 (ALJ's Decision at 7-9); *see also Dunahoo*, 241 F.3d at 1338 (finding the ALJ's decision adequate where "[t]he ALJ recited the five *Polaski* factors and detailed the relevant evidence"); *Hogan*, 239 F.3d at 962. After summarizing the Keehns' testimony concerning Keehn's subjective complaints, the ALJ found as follows:

> The undersigned finds the claimant's allegations of total disability are not believable. Other than the claimant's own treating physician, Dr. Richards, no other examining or treating physician has found any objective evidence that would support his level of alleged pain. As Dr. Hunter noted after her review, his "physical exam is essentially unremarkable." The undersigned also agrees with Dr. Hunter that the claimant's credibility is further eroded by the fact that he did not seek further medical intervention between his July 1997 physical examination and his July 1998 physical examination. An extended period of one year during which he did not seek medical treatment for alleged disabling pain indicates that his pain is of at least tolerable level. The undersigned also notes that the claimant used only over-the-counter medications for the first several years after his alleged disability onset, and indicates that even now he uses his prescribed pain medications only sparingly. This also indicates that the claimant's pain is of at least a tolerable level. Further, the claimant's activities of daily living indicate that he is capable of a much higher level of functioning tha[n] he alleges. For the above reasons, the undersigned finds the claimant's allegations of total disability are not believable.

Transcript at 21 (ALJ's Decision at 9). The inconsistencies the ALJ found in the record

do indeed undercut the Keehns' credibility. *See Gowell*, 242 F.3d at 796-97 (noting that conservative treatment, the lack of organic disorders and "unremarkable" test results, and failure to follow physician's recommendations all discredit subjective pain complaints); *Hogan*, 239 F.3d at 962 (sufficiently "good reason" to discredit the claimant's subjective pain complaints existed, "because her treatment was not consistent with the amount of pain she described at the hearing [and] because the time between her doctor's visits did not indicate that she was suffering from severe pain").

Keehn's attempt to show that the ALJ's reasons are unsupported by the factual record is unconvincing. Keehn contends that the ALJ's conclusion is contrary to the record evidence indicating that none of the medical consultants or providers questioned that Keehn suffered from pain. Although this is true, the ALJ relied on the fact that "[o]ther than the claimant's own treating physician, Dr. Richards, no other examining or treating physician has found any objective evidence that would support his *level* of alleged pain." Transcript at 21 (ALJ's Decision at 9) (emphasis added). As in *Gowell*, "'there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is.'" *Gowell*, 242 F.3d at 796 (quoting *Woolf*, 3 F.3d at 1213, in turn quoting *Thomas*, 928 F.2d at 259). None of the physicians besides Dr. Richards was able to identify any objective, medical evidence that was consistent with the *level* of Keehn's pain complaints. Dr. Moss found that an x-ray revealed that "the plate [is] intact with significant bony hypertrophy from his healed fracture [but] no loosening of the plate or screws [is] appreciated." Transcript at 241. Dr. Grobler found Keehn's MRI was "largely unremarkable." Transcript at 266. Dr. Richards's somewhat different view appears, from this court's review of the record, to be based largely on Keehn's subjective complaints, not on any substantial objective medical evidence. *See, e.g.*, Transcript at 281-82 (recounting, after Keehn's July 25, 1997, examination, Keehn's own statement of his degree and frequency of pain, and performing only a superficial examination of Keehn's performance while walking, squatting, etc., and probing affected

areas, then prescribing only a mild antidepressant, Amitriptyline, and over-the-counter pain medication, Tylenol); *id.* at 283-85 (records from Keehn's March 17, 1998, examination finding no masses in Keehn's chest, observing Keehn's ability to walk on his heels and toes, noting "no advancing neurologic findings," continuing only Tylenol for pain, and recommending a repeat MRI); *id.* at 286-90 (records from Keehn's July 28, 1998, "disability physical," noting only Voltaren XR, a nonsteroidal anti-inflammatory drug, as well as Amitriptyline and Tylenol as part of Keehn's medication regimen, and performing some range-of-motion tests). No other doctors found any objective medical evidence to support the *level* of pain of which Keehn complained.

Keehn also contends that the ALJ simply listed Keehn's daily activities, without explaining in what way they are inconsistent with objective medical evidence or otherwise indicated that he was "capable of a much higher level of functioning tha[n] he alleges." This criticism, however, goes more to "arguable deficiency . . . in the ALJ's opinion-writing technique," but "does not require the Court to set aside a finding that is supported by substantial evidence." *Johnson*, 240 F.3d at 1149. The court admits that, as to the ALJ's evaluation of this aspect of the record, the court might well have reached a different conclusion, *see, e.g., Burnside*, 223 F.3d at 843 (the court may not reverse the ALJ simply because the court might have "decided the case differently"), but the court has not found, and Keehn has not identified, any record evidence that plainly detracts from the ALJ's conclusion that Keehn was capable of a higher level of activity. *See, e.g., Warburton*, 188 F.3d at 1050 (the court should consider evidence "that detracts from the Commissioner's decision as well as evidence that supports it").

Moreover, the relative infrequency with which Keehn sought treatment, his failure to follow through on recommended courses of treatment or evaluation, and his reliance primarily on over-the-counter pain medications all strongly suggest that his complaints about the level of his pain and its impact on his daily activities are not entirely credible. *See*

Gowell, 242 F.3d at 796-97; *Hogan*, 239 F.3d at 962. Although the court is sympathetic to the argument that it is unfair to conclude from a claimant's failure to pursue medical treatment that the claimant could not afford that the claimant is not as "disabled" as he or she asserts, the court is considerably less sympathetic to arguments that medical treatment was too expensive when the claimant, like Keehn, admits to continuing to spend money on two packs of cigarettes and several beers a day. *See, e.g.*, *Riggins v. Apfel*, 177 F.3d 689 (8th Cir. 1999) (the claimant's three-pack-a-day cigarette habit mitigated against his claims that he could not afford health care costs).

The court concludes that the ALJ's decision to discount the testimony of Keehn and his wife concerning Keehn's subjective pain complaints is supported by substantial evidence in the record as a whole. Therefore, Keehn's first objection to the Report and Recommendation is overruled.

2. Dr. Richards's evaluation

Keehn's second objection to the Report and Recommendation is that the Report and Recommendation incorrectly concludes that Dr. Richards is not a "treating physician," and thus does not give proper weight and consideration to that physician's opinions concerning his disability. Although Judge Zoss noted that the ALJ, like Keehn, had assumed that Dr. Richards was a treating physician, Judge Zoss concluded, on his reading of the record, that Dr. Richards was not a treating physician, and thus his opinions must be evaluated as, and given only the weight of, the opinion of a non-treating physician. Moreover, Judge Zoss found that Dr. Richards's opinions are directly contradicted by the opinions of nearly all of the other physicians, treating and non-treating, who examined or evaluated Keehn. While the court would likely part company with Judge Zoss on his first conclusion, if the court were required to determine whether or not Dr. Richards was a "treating physician," the

court agrees with Judge Zoss as to the ultimate impact of Dr. Richards's opinions.[1] *See* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]."). This is so, because, even assuming Dr. Richards was a "treating physician"—the assumption made by the ALJ—the ALJ properly disregarded his opinions.

As the Eighth Circuit Court of Appeals recently explained, "An ALJ's failure to consider or discuss a treating physician's opinion that a claimant is disabled is error when the record contains no contradictory medical opinion." *Hogan*, 239 F.3d at 961 (citing *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998)). However, in this case, the ALJ both considered and discussed Dr. Richards's opinion, assuming he was a treating physician, and still disregarded his opinion. *See* Transcript at 17-19 & 21 (ALJ's Decision at 5-7 & 9). "[W]hen the opinion of a treating physician is 'well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence' in the record, it is entitled to controlling weight." *Gowell*, 242 F.3d at 798 (quoting *Prosch v. Apfel*, 201 F.3d 1010, 1012-13 (8th Cir. 2000), and also citing 20 C.F.R. § 404.1427(d)(2)); *Hogan*, 239 F.3d at 961 (same). "Although a treating physician's opinion is entitled to great weight, it does not *automatically* control or obviate the need to evaluate the record as a whole." *Hogan*, 239 F.3d at 961 (emphasis added). Thus, "[e]ven assuming that Dr. [Richards] was the treating physician, his opinion is not entitled to substantial weight if it is inconsistent with other substantial evidence in the record." *Dunahoo*, 241

[1]The court notes that Dr. Richards likely satisfies the definition of "treating physician" in 20 C.F.R. § 404.1502, as he "provided [the claimant] with medical treatment or evaluation and . . . has or has had an ongoing treatment relationship with the [claimant]." As Keehn argues, Dr. Richards stepped into the shoes of Dr. Moss as Keehn's primary physician at Kossuth Regional Health Center, and thus at least presumptively, acted upon all of the medical records and medical history about Keehn in the hands of that practice, and treated Keehn on at least three occasions over a period of two years.

F.3d at 1038 n.2 (citing *Kelley v. Callahan*, 133 F.3d 583, 589 (8th Cir. 1998)); *Hogan*, 239 F.3d at 961 ("The ALJ may discount or disregard [a treating physician's] opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions."). Moreover, "'[i]t is the ALJ's function to resolve conflicts among "the various treating and examining physicians."'" *Johnson*, 240 F.3d at 1148 (quoting *Bentley v. Shalala*, 52 F.3d 784, 785 (8th Cir. 1995), in turn quoting *Cabrnoch v. Bowen*, 881 F.2d 561, 564 (8th Cir. 1989)). "The ALJ may reject the conclusions of any medical expert, whether hired by the claimant or the government, if they are inconsistent with the record as a whole." *Id.* Such inconsistencies between Dr. Richards's opinions and the record as a whole are present here.

The ALJ rejected Dr. Richards's opinion, as stated following his July 1997 examination of Keehn, for the following reasons:

> Steven D. Richards, D.O., stated that, "I encouraged him to continue in his appeal process for the SSI as I think he is probably entitled to this." (Exhibit 6F) While the undersigned recognizes a treating physician's obligation to his patient, a physician's desire to treat his patient in the most effective manner possible, and the necessity to accept the patient's symptomatic allegations of impairment as worthy of belief in order to appropriately treat the patient, the undersigned does not accept the opinion of Dr. Richards that the claimant is disabled within the meaning of the Social Security Act on this record. A conclusion by a treating physician that his patient is "disabled" or "unable to work," standing alone, nor symptomatic allegations of the claimant, in and of themselves, do not constitute a sufficient basis for a finding of disability within the meaning of the Social Security Act (20 CFR 404.1527 and 404.1529).

Transcript at 17 (ALJ's Decision at 5). Similarly, the ALJ rejected Dr. Richards's opinions, as expressed following Keehn's July 1998 examination, for the following reasons:

> Dr. Richards' objective findings do not substantiate his opinions

> regarding the claimant's functional capacity. By his own findings, the claimant had no limitations in any range of motion, and the claimant's neurological examination was "unremarkable." He did find positive straight-leg raising at about 65 degrees on the left, but the claimant could heel and toe walk, as well as do deep knee bends. He did note some loss of abduction in the left shoulder, though no frank weakness of that arm was noted. (Exhibit 8F). Dr. Richards' opinions subsequent to his July 1998 evaluation of the claimant are given little weight for the same reasons as noted above, as well as the fact that they are not consistent with his own objective findings.

Transcript at 17-18 (ALJ's Decision at 5-6). The ALJ also rejected Dr. Richards's opinions, because "no other examining or treating physician has found any objective evidence that would support his level of alleged pain." Transcript at 21 (ALJ's Decision at 9).

Keehn contends that the ALJ improperly rejected Dr. Richards's opinion, as a treating physician, on the basis of information only obtained from the two non-examining physicians in the record, Dr. Weiss and Dr. Hunter, and the opinions of such non-examining physicians cannot outweigh the opinion of a treating physician. However, information from Drs. Weiss and Hunter does not appear to be the only basis, or even the primary basis, on which the ALJ rejected Dr. Richards's opinions. Rather, the ALJ rejected Dr. Richards's opinion from July 1997 on the ground that it was based primarily on Keehn's own statement of his symptoms, which the ALJ elsewhere found were not entirely credible. *See* Transcript at 17 (ALJ's Decision at 5). Similarly, as to Dr. Richards's opinions in July 1998, the ALJ relied on the inconsistencies between the opinions and the objective medical observations Dr. Richards had himself obtained. *See* Transcript at 17-18 (ALJ's Decision at 5-6). A treating physician's opinion may be disregarded if it is inconsistent with other substantial evidence in the record as a whole, *see Dunahoo*, 241 F.3d at 1038 n.2; *Johnson*, 240 F.3d at 1148; *Hogan*, 239 F.3d at 961, and, therefore, certainly can be disregarded if it is inconsistent with the objective evidence upon which the physician supposedly relies. *Cf.*

Hogan, 239 F.3d at 961 ("The ALJ may discount or disregard [a treating physician's] opinion if . . . the treating physician has offered inconsistent opinions.").

Furthermore, in addition to any information from non-treating physicians Drs. Hunter and Weiss, the ALJ found that Dr. Richards's opinions were inconsistent with objective medical evidence in the record from other sources. Dr. Richards himself recognized that his neurological examination of Keehn in March of 1998 showed "no advancing neurologic findings." *See* Transcript at 283 (Medical Records from Kossuth Regional Health Center, Dr. Richards, 3-17-98).[2] In his report on a Disability Physical in July of 1998, Dr. Richards acknowledged that Dr. Grobler and the back pain clinic at the University of Iowa Hospitals could find "no surgical cause for [Keehn's] discomfort," and that Keehn's "NEURO/PSYCHIATRIC" condition was "unremarkable." *See* Transcript at 287 (Disability Physical report by Dr. Richards, July 28, 1998); *and compare* Transcript at 17 (ALJ's Decision at 5) (noting that in July 1998, Dr. Richards had found Keehn had "chronic left low back pain and leg pain with non-surgical causes identified" and that Keehn's "neurological examination was 'unremarkable'"). Thus, Dr. Richards's opinions are contrary to or inconsistent with objective medical evidence derived from actual examinations of Keehn by treating physicians or consulting specialists, not simply opinions of non-treating physicians such as Drs. Weiss and Hunter.

In short, even assuming Dr. Richards is a "treating physician," and that his opinions might be entitled to "great" or even "controlling" weight in other circumstances, here, the ALJ properly disregarded Dr. Richards's opinions on the grounds that they were inconsistent with other substantial evidence in the record as a whole. *See Dunahoo*, 241 F.3d at 1038 n.2; *Johnson*, 240 F.3d at 1148; *Hogan*, 239 F.3d at 961. Keehn's second objection to the Report and Recommendation will consequently also be overruled.

---

[2]The court notes that pages 284 and 285 in the Transcript are reversed from the proper order of the medical records.

3. The vocational expert's response to the proper hypothetical question

Keehn acknowledged that his third objection—that the Report and Recommendation incorrectly determines that a hypothetical question relied on by the ALJ at step five of the disability determination process correctly states his residual functional capacity—was contingent upon the ALJ's and Judge Zoss's improper evaluation of the credibility of his testimony and that of his wife concerning his subjective pain complaints and the weight to be given Dr. Richards's opinions as a "treating physician." Specifically, Keehn contended that, if the elements based on the opinion of Dr. Richards were added into the hypothetical question posed to the vocational expert, the vocational expert testified that there would be no jobs available in the national economy for Keehn, thereby resulting in a finding of disability. Similarly, Judge Zoss noted in his Report and Recommendation, "If the ALJ had accepted this evidence [*i.e.*, the opinions of Dr. Richards], there would have been substantial evidence in the record to support a finding that Keehn was disabled." Report and Recommendation at 32.

In *Johnson*, the Eighth Circuit Court of Appeals explained,

> The hypothetical question posed to the vocational expert must "capture the concrete consequences of [the] claimant's deficiencies." *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir. 1997). Likewise the ALJ may exclude any alleged impairments that she has properly rejected as untrue or unsubstantiated. *Long v. Chater*, 108 F.3d 185, 187 (8th Cir. 1997). The ALJ did not find credible Johnson's assertion that his depression would prevent him from holding a job given the other evidence in the record. Since the vocational expert was basing her opinion upon Johnson's assertions, this portion of the opinion was properly disregarded.

Johnson, 240 F.3d at 1148. Similarly, in this case, the court agrees with the ALJ and Judge Zoss that the Keehns' testimony and Dr. Richards's opinions were properly disregarded. Therefore, the impairments those portions of the record suggested were properly excluded from the first hypothetical question posed to the vocational expert. The vocational expert's

testimony as to the first hypothetical question consequently established that Keehn was *not* disabled within the meaning of the Social Security Act.

Consequently, Keehn's third objection to the Report and Recommendation must also be overruled.

III. CONCLUSION

Upon *de novo* determination of those portions of the report or specified proposed findings or recommendations to which Keehn has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that Keehn's objections must be **overruled**. The ALJ properly discredited the testimony of Keehn and his wife concerning Keehn's subjective pain complaints, properly disregarded the opinions of Dr. Richards, even assuming he was a "treating physician," and consequently properly excluded from the determinative hypothetical question to the vocational expert those impairments identified in discredited or disregarded portions of the record. Therefore, the March 23, 2001, Report and Recommendation by Magistrate Judge Paul A. Zoss concerning disposition of this matter is **accepted**—as modified, to the extent that the court assumes Dr. Richards was a "treating physician," *see* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].")—and **judgment shall enter in favor of the Commissioner** and against Keehn in this action.

IT IS SO ORDERED.

DATED this 12th day of April, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA